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No. 08-260

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In The

# Supreme Court of the United States

D'ANNA BATES,

*Petitioner,*

vs.

LEE HARVEY,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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## STATEMENT OF THE ISSUES

1) Whether Respondent Harvey, under the totality of the undisputed facts and circumstances, had exigent circumstances or some other valid cause under the Fourth Amendment to enter Petitioner's residence where he attempted to detain her.

2) If Respondent Harvey was not lawfully present, whether qualified immunity protects him from Petitioner's Fourth Amendment false arrest claim.

## STATEMENT OF THE CASE

This case involves Petitioner's claim that Deputy Sheriff Lee Harvey is liable under 42 U.S.C. § 1983 and the Fourth Amendment for arresting her on March 21, 2003. The Court of Appeals for the Eleventh Circuit ruled that qualified immunity protected Respondent from Petitioner's false arrest claim, focusing primarily on Deputy Harvey's entry of the residence, even though Petitioner has never asserted a claim for illegal entry.

Respondent provides the following factual background for the Court's review, as certain salient details either were mischaracterized or omitted by Petitioner in the *Petition for Writ of Certiorari*. Respondent notes that this case was decided at the summary judgment stage, so that the "facts" as reported by Petitioner and as related below are

presented in the light most favorable to Petitioner, and as if Petitioner's story is "true."

**A. Background**

On the morning of March 21, 2003, Mark and Wanda Wilson appeared in the Upson County Probate Court and sought a commitment order for their son T.W. The Probate Court issued an order that directed law enforcement officers to pick up T.W. and commit him to a mental hospital. R2-36-2 at 2, 6 (hereinafter the "Commitment Order").

The March 21 Commitment Order recited that T.W. was alleged under oath to be:

> A MENTALLY ILL PERSON requiring involuntary treatment . . . An ALCOHOLIC requiring involuntary treatment and . . . A DRUG DEPENDENT Individual or drug abuser requiring involuntary treatment and who presents a substantial risk of serious harm to himself or others as manifested by either recent overt acts or recent expressed threats of violence which present a probability of physical injury to himself or to other persons or who is incapacitated by drugs on a recurring basis.

R2-36-2 at 6.

A short time later that same morning, Sergeant David Walker of the Upson County Sheriff's Office learned from T.W.'s mother that her son T.W. was staying at Petitioner's residence in Pike County,

Georgia. In fact, T.W. had been staying at Petitioner's residence for the past few days. He typically stayed every weekend, and stayed there an estimated 200 times from August 2002 to March 20, 2003. R2-42 at 9-10; *see* R2-41 at 18. He was more a resident of Petitioner's household than of his parents' household.

Sergeant Walker was charged with executing the Commitment Order, and therefore he called the Pike County Sheriff's Office, requesting assistance in serving the Order at Petitioner's residence in Pike County. R2-36-7 at 145-146 (Respondent's MSJ Ex.F, Walker testimony). Shortly thereafter, Sergeant Walker met with Pike County Deputy Sheriff Lee Harvey in Pike County and showed him the Commitment Order. Deputy Harvey agreed to assist Deputy Walker in executing the Order. R2-36-7 at 145-146 (Respondent's MSJ Ex.F, Crim.Tr. Transc.); R4-52 at 33.

Accordingly, on the same morning that the Commitment Order was issued, the officers drove to Petitioner's address, where T.W.'s mother told Deputy Walker her son would be staying. R2-36-7 at 8-9 (Respondent's MSJ Ex.F, Crim.Tr. Transc.); R4-52 at 33.

Contrary to Petitioner's factual rendition, the officers acted in accordance with the danger reflected in the Commitment Order. The officers sought to execute the Commitment Order shortly after its

issuance,[1] in spite of the geographical divide between Upson County and rural Pike County where T.W. was located. *See Doe v. Kearney*, 329 F.3d 1286, 1298 (11th Cir.2003) (finding exigent circumstances, and that officer "investigated diligently and acted almost immediately after the relevant facts came to her attention"). The officers met, conferred, and then went straight to the Bates residence to find T.W. R4-52 at 33. Deputy Harvey testified to his wariness in approaching a strange residence where drugs, weapons and at least one violent person (T.W.) likely were present. R4-52 at 32 (Harvey Dep. at 32); *see also* R4-52 at 28-29 (testifying to general level of danger in serving papers in rural Pike County).

### B. At the Residence

When the officers arrived, Deputy Harvey asked a teenager (S.B.) who answered the door whether T.W. was there. She responded either no or that she did not know, but told the officer that T.W. (the subject of the Commitment Order) and her brother had been out the night before. R2-36-7 at 182 (Respondent's MSJ Ex.F, Crim.Tr. Transc.); R4-52 at 36.

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[1] The Commitment Order appears to have been issued at approximately 9:00 a.m. on March 21, 2003, R2-36 Ex. 2 at 2, 6 (Commitment Order), and it is undisputed that the officers approached the Bates residence later that same morning. R3-47 Ex.13 at 158 (Officer Walker testimony); *Petitioner's Initial Eleventh Circuit Brief* at 48 (stating that the officers approached the Bates residence before 10:00 a.m. on March 21, 2003).

The teenager told Deputy Harvey that her brother drove a red truck, and Deputy Harvey saw a red truck in the driveway. Based on that information and information provided by Deputy Walker from T.W.'s mother about where T.W. was staying, Deputy Harvey concluded that T.W. was in the residence. R4-52 at 56.

The officers went inside and soon located T.W. asleep in one of the rooms. R4-52 at 37-38. The officers then awoke T.W., identified him, told him to get his clothes on, and explained that he would have to go with them per the Commitment Order. R4-52 at 38-40.

### C. The Confrontation

Petitioner D'Anna Bates also was in the residence. Petitioner was a probationer at the time, having been convicted of four drug-related felonies. R2-38 at 57 & Exhibit 1.

According to Petitioner, she heard banging outside her closed bedroom door. Petitioner therefore left her bedroom and soon saw Deputy Harvey trying to confirm her son's identity. R2-38 at 94-95, 99. Petitioner stopped in the doorway of her son's bedroom, and she asked Deputy Harvey what he was doing or did he have a warrant to search her son's room. R2-38 at 100-101.

Deputy Harvey responded that he had a court order. R2-38 at 101-102. Petitioner repeatedly demanded to see a warrant immediately, and demanded the officers to leave the residence if they did not show her a warrant. R1-1 at 13-14 ¶45; R2-38 at 102-103, 106-107. In response, Deputy Harvey repeatedly asked Petitioner to calm down, and explained to her that the officers had a commitment order for T.W. out in the car, which he would show her. R4-52 at 41-43, 51; R2-38 at 102-103. This somewhat heated initial discussion lasted approximately three minutes. R2-38 at 106.

Deputy Harvey became concerned because Petitioner was diverting his attention, increasing the stress level and danger to the officers, instigating the boys (who ceased cooperating after Petitioner launched her harangue), and hindering the officers' ability efficiently to take T.W. into custody and leave. R4-52 at 42, 46-48, 52.

Petitioner claims that, as she continued to demand that the officers leave and pointed toward the door, Deputy Harvey tried to detain her. He moved toward her, grabbed her right hand and quickly spun her around, causing her to fall to the floor in the carpeted doorway area. R2-38 at 106, 109-111. Petitioner quickly got up and fled into the open doorway of a nearby bathroom. R2-38 at 111-113.

A scuffle ensued as Petitioner attempted to barricade herself in a bathroom. However, Deputy Harvey eventually was able to pull her out, but not

before being engaged in a minute-long struggle. R2-38 at 113-123; R4-52 at 60-62; *see also* R2-38 at 78 & Exhibit 2. Both officers tried to restrain Petitioner as she kicked.

Once out of the bathroom, Petitioner fought the two male officers' efforts to restrain her, crawling on her hands and knees and dragging herself a total of about six to ten feet into the living room area. R2-38 at 126-127, 129-131, 137, 151, *see also* R2-38 at 78 & Exhibit 2 (floor plan labeled points "1" and "2"); R1-1 at 8 ¶24. In her complaint statement to the Sheriff's Office, Petitioner stated that she "started fighting back after being hit and was kicking out" until her husband appeared. R2-38 at 200-201 & Exhibit 11.

As Petitioner fought with the officers in the hallway area, she screamed to her son to get in the room and shut the door. R2-38 at 122-123. Both her son and T.W. take credit for closing and locking the bedroom door. R2-42 at 24; R2-41 at 15-16. T.W. then climbed out of the bedroom window and fled. R2-41 at 16. After the bedroom door was closed, Deputy Harvey got up and attempted to open the bedroom door, but it was locked.

**D. T.W. Escapes**

Once Petitioner finally surrendered, she got up with one wrist handcuffed. R2-38 at 136-137. At the same time, Deputy Harvey saw T.W. trying to escape by running toward the woods. Therefore, Harvey ran out the door after T.W., and immediately announced

T.W.'s description over the radio so that responding officers could recognize him. R4-52 at 77-78, 80. Meanwhile, Petitioner stood up, took her handcuff off and handed it back to Deputy Walker. R2-38 at 138.

As Deputy Harvey searched through the woods for T.W., he felt a sharp pain in his groin area, and realized that Petitioner had injured him during the struggle. R4-52 at 85-86. Following a large manhunt, T.W. eventually was picked up in accordance with the Commitment Order. R4-52 at 82-83, 86; R2-36-7 at 155-156 (Respondent's MSJ Ex.F – Trial Tran. Walker).

**E. The Arrest**

During the manhunt, Petitioner moved freely around her residence without handcuffs, took a shower, called her sister, and walked outside and spoke with her husband. R2-38 at 140-141, 171-174. Having given up searching for T.W., Deputy Harvey went back to the Bates residence to arrest Petitioner. According to Petitioner, when she saw Deputy Harvey she went inside the residence. R2-38 at 174. Deputy Harvey announced to Petitioner that she was under arrest, handcuffed her, and transported her to the Pike County Jail without further incident. R4-52 at 87; R2-38 at 174-175, 178-179, 193.

## SUMMARY OF ARGUMENT

Petitioner mistakenly argues that the lower court's qualified immunity holding conflicts with *Hope v. Pelzer*, 536 U.S. 730, 122 S.Ct. 2508 (2002). *Hope* did not alter the qualified immunity doctrine, and *Hope*'s Eighth Amendment ruling in an obvious, egregious case is nothing like this Fourth Amendment case, which required a fact-specific inquiry. *See, e.g., Saucier v. Katz,* 533 U.S. 194, 201, 121 S.Ct. 2151 (2001) (requiring inquiry into particular factual circumstances against the backdrop of previous law); *Anderson v. Creighton*, 483 U.S. 635, 641, 107 S.Ct. 3034, 3040 (1987) ("the determination whether it was objectively legally reasonable to conclude that a given search was supported by probable cause or exigent circumstances will often require examination of the information possessed by the searching officials."). In granting qualified immunity the Eleventh Circuit was faithful to this Court's precedent, including *Hope*.

Next, Petitioner contends that *Steagald v. United States*, 451 U.S. 204, 101 S.Ct. 1642 (1981), rendered qualified immunity unavailable in this case. However, unlike this case *Steagald* plainly did not implicate the exigent circumstances doctrine. *Steagald*, 451 U.S. at 211, 101 S.Ct. at 1647 ("The search at issue here took place in the absence of consent or exigent circumstances."). Because the exigent circumstances doctrine controls this case, *Steagald* did not clearly establish any rule pertinent here.

On the other hand, cases from this Court and the Courts of Appeals have ruled that an officer with reasonable information that the occupant of a dwelling is in imminent physical danger has "exigent circumstances" sufficient to excuse a search warrant. That fundamental rule, together with the absence of any cases prohibiting Deputy Harvey's conduct in this case, reveal that the Eleventh Circuit's qualified immunity decision is fully consistent with this Court's qualified immunity precedent.

Finally, for four separate reasons Petitioner cannot show violation of her Fourth Amendment right, which logically is the first step in the qualified immunity analysis. First, Petitioner was a probationer, and in Georgia probationers are subject to warrantless arrest in their homes. Second, Petitioner was arrested only after she left her residence and appeared in public, and "her act of retreating into her house" could not thwart "an otherwise proper arrest." *United States v. Santana*, 427 U.S. 38, 42, 96 S.Ct. 2406, 2409 (1976). Third, apparent and imminent danger to an occupant justified entry of the residence to find T.W. Fourth, the special needs exception to the Fourth Amendment provided sufficient authority to serve the Commitment Order without a search warrant.

For all these reasons, the Petition for Certiorari should be denied.

## ARGUMENT AND CITATIONS TO AUTHORITY

### I. THE LOWER COURT'S DECISION IS CONSISTENT WITH *HOPE v. PELZER*, WHICH HAS NO SIGNIFICANT APPLICATION TO THIS CASE

Petitioner wrongly contends that the Eleventh Circuit's decision in this case conflicts with *Hope v. Pelzer*, 536 U.S. 730, 122 S.Ct. 2508 (2002). Beyond generalities, *Hope* has no application to this Fourth Amendment case, and the lower court's qualified immunity ruling is fully consistent with *Hope* and this Court's Fourth Amendment qualified immunity jurisprudence.

#### A. *Hope* Bears No Resemblance To This Case

In factual terms this case is much different than *Hope*, which involved a state prisoner's cruel and unusual punishment claim against prison officials. The prisoner was shackled shirtless to a hitching post for hours in the hot sun, without sufficient water or bathroom breaks, as a means of punishment. *Hope*, 536 U.S. at 734-735, 122 S.Ct. at 2512-2513. Nothing like that egregious scenario is presented here.

In sharp contrast to *Hope*, this case involves a law enforcement officer who tried to take a drug-dependent, violent juvenile into protective custody under a court order. Respondent was under a duty to

protect life, and he operated under a fresh court order that indicated lives were in imminent danger.

Unlike this case, *Hope* involved an obvious, egregious example of deliberate cruelty, and stands in the line of cases where every officer "should have known better," even without reading the Federal Reports. *See, e.g., Williams v. United States,* 341 U.S. 97, 101, 71 S.Ct. 576, 579 (1951) (holding that beating a suspect to obtain a confession plainly violates clearly established law, even in the absence of a previous decision saying so). The distinction is important because the present case involves an officer trying to *protect life* and carry out lawful objectives under far more ambiguous and emergent circumstances. Qualified immunity was made for cases like this one, but not for cases like *Hope*.

### B. Unlike This Case, *Hope* Deals With Obvious, Egregious Constitutional Violations

*Hope* did not overrule or alter this Court's qualified immunity precedent. Rather, unlike the present case and this Court's qualified immunity decisions in the Fourth Amendment context, *Hope* dealt with an obvious constitutional violation under egregious circumstances.

*Hope* stands for the proposition that qualified immunity does not necessarily bar a claim when there is no prior case with highly similar facts. *Hope*, 536 U.S. at 741, 122 S.Ct. at 2516. In fact, *Hope* pointed out that the lower court's own Eighth

Amendment precedent provided enough factual detail to provide notice to prison officials that their particular conduct in that case was unconstitutional. *Id.* at 745. But *Hope*'s ruling simply is not implicated here.

*Hope* is inapposite primarily because this is not an "obvious violation" case. Rather, this is an exigent circumstances case under the Fourth Amendment. In such Fourth Amendment cases, this Court consistently has undertaken a fact-specific qualified immunity analysis in the absence of an "obvious" violation. *Brosseau v. Haugen*, 543 U.S. 194, 198, 199, 125 S.Ct. 596, 599 (2004) (discussing *Hope* as an "obvious" violation case, and moving on to focus on particularized facts and case law where there was no obvious violation); *Saucier v. Katz,* 533 U.S. 194, 201, 121 S.Ct. 2151 (2001) (requiring inquiry into particular factual circumstances against the backdrop of previous law).

Moreover, contrary to Petitioner's reading of the lower court's opinion, the Eleventh Circuit's qualified immunity holding in this case does not rest solely on the absence of a case with highly similar facts. To be sure this case is *sui generis*. There are no controlling cases from this Court or the Eleventh Circuit for the exigent circumstances inquiry at hand, and that dearth of case law certainly militates in favor of qualified immunity. *See Brosseau v. Haugen*, 543 U.S. 194, 201, 125 S.Ct. 596, 600 (2004) (granting qualified immunity after finding that previous cases "taken together undoubtedly show that this area is one in which the result depends very much on the facts of

each case."). However, as detailed in § II below, the lack of controlling authority was not the sole basis for the Eleventh Circuit's qualified immunity decision.

In sum, there is no reason to look beyond the Court's Fourth Amendment jurisprudence to focus instead upon the inapposite *Hope* decision. Moreover, as discussed below, it is Petitioner's view of qualified immunity that conflicts with this Court's precedent. The Eleventh Circuit, on the other hand, got it right.

## II. THE COURT OF APPEALS PROPERLY RULED THAT QUALIFIED IMMUNITY PROTECTS DEPUTY HARVEY AGAINST PETITIONER'S FOURTH AMENDMENT FALSE ARREST CLAIM

As framed by the Petition for Certiorari and the lower court's decision, this is a Fourth Amendment exigent circumstances case. Therefore, this Court's Fourth Amendment qualified immunity precedent is the proper starting point for analysis. Under that precedent, the particularized facts and circumstances usually are of critical importance. *See Anderson v. Creighton*, 483 U.S. 635, 641, 107 S.Ct. 3034, 3040 (1987) ("the determination whether it was objectively legally reasonable to conclude that a given search was supported by probable cause or exigent circumstances will often require examination of the information possessed by the searching officials.").

### A. Qualified Immunity In This Case Must Account for Particularized Facts and Circumstances

"Because 'the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,' . . . its proper application requires careful attention to the facts and circumstances of each particular case[.]" *Graham v. Connor,* 490 U.S. 386, 396, 109 S.Ct. 1865, 1872 (1989) (quoting *Bell v. Wolfish,* 441 U.S. 520, 559, 99 S.Ct. 1861 (1979)).

Recently this Court reiterated that qualified immunity protects officers who, like Deputy Harvey, are forced to make difficult decisions under the Fourth Amendment, while facing pressured circumstances without clear guidance in their particularized circumstances.

> Qualified immunity shields an officer from suit when [he] makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances [he] confronted. Because the focus is on whether the officer had fair notice that [his] conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct. If the law at that time did not clearly establish that the officer's conduct would violate the Constitution, the officer should not be subject to liability or, indeed, even the burdens of litigation. **It is important to emphasize that this inquiry must be undertaken in light of the**

> **specific context of the case, not as a broad general proposition**.

*Brosseau v. Haugen*, 543 U.S. 194, 198, 125 S.Ct. 596, 599 (2004) (citations and internal punctuation omitted; emphasis and alteration supplied); *see also Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151 (2001) (requiring inquiry into particular factual circumstances against the backdrop of previous law).

Over 20 years ago, this Court ruled that where an officer acts within an exception to the warrant requirement with no clear law to guide him, qualified immunity protects him even if a court later declares his conduct unconstitutional. That is precisely the case here.

> The legality of the warrantless domestic security wiretap . . . was, at that time, an open question, and *Harlow* teaches that officials performing discretionary functions are not subject to suit when such questions are resolved against them only after they have acted. The District Court's conclusion that [the Defendant] is not immune because he gambled and lost on the resolution of this open question departs from the principles of *Harlow*. Such hindsight-based reasoning on immunity issues is precisely what *Harlow* rejected. The decisive fact is not that [Defendant's] position turned out to be incorrect, but that the question was open at the time he acted. Hence, in the absence of contrary directions from Congress, the [Defendant] is

immune from suit . . . notwithstanding that his actions violated the Fourth Amendment.

> N. 12. We do not intend to suggest that an official is always immune from liability or suit for a warrantless search merely because the warrant requirement has never explicitly been held to apply to a search conducted in identical circumstances. But in cases where there is a legitimate question whether an exception to the warrant requirement exists, it cannot be said that a warrantless search violates clearly established law.

*Mitchell v. Forsyth,* 472 U.S. 511, 535 & n.12, 105 S.Ct. 2806, 2820 & n.12 (1985) (discussing *Harlow v. Fitzgerald,* 457 U.S. 800, 102 S.Ct. 2727 (1982)).

Here, consistent with this Court's precedent, the Eleventh Circuit began its "clearly established law" inquiry with the observation that prior cases told law enforcement officers like Deputy Harvey that protecting human life is among the most compelling "exigent circumstances" known to the law. *Bates v. Harvey,* 518 F.3d 1233, 1248 (11th Cir.2008) (discussing exigent circumstances precedent and referencing *Mincey v. Arizona,* 437 U.S. 385, 392, 98 S.Ct. 2408, 2413 (1978), *Warden v. Hayden,* 387 U.S. 294, 87 S.Ct. 1642, and *United States v. Holloway,* 290 F.3d 1331 (11th Cir.2002)). This Court recently reinforced that fundamental rule in a case where officers entered a residence without a warrant to break up a

violent fight and provide assistance to the injured. *Brigham City, Utah v. Stuart,* 547 U.S. 398, 126 S.Ct. 1943, 1947 (2006).

The Eleventh Circuit properly noted that Deputy Harvey acted under a mandate to protect human life under an emergency court order. As noted above, prior case law squarely told Deputy Harvey that he could enter a residence without a search warrant to protect human life in an emergency. Therefore, an officer in Deputy Harvey's shoes reasonably could conclude that he had exigent circumstances to enter Petitioner's residence.[2]

Consistent with that common sense evaluation, the Eleventh Circuit pertinently pointed out that prior law did not *prohibit* Deputy Harvey from making a warrantless entry into a residence under this particular exigent scenario. To an officer standing in Deputy Harvey's shoes, prior law did not say "no," and it did not categorically say "yes" on the exigent circumstances question. Rather, previous exigent circumstances case law said "probably so."

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[2] Petitioner disingenuously argues that Deputy Harvey did not rely upon the exigent circumstances doctrine before being sued in this case. It is unclear when Petitioner thinks Deputy Harvey had reason or opportunity to raise or discuss exigent circumstances, before he was required to defend himself in the present action.

The Eleventh Circuit's ruling speaks for itself:

> Deputy Harvey was presented with an order by a state court judge that said that a young man needed to be picked up and placed in custody because he presented a danger to himself and to others. A reasonable officer could have interpreted these averments as indicating a life or death emergency and felt compelled to execute the order with the speed and immediate attention applicable in an emergency situation. In this case, the civil commitment order was effectuated on the same day it was issued, providing support to Deputy Harvey's argument that a reasonable officer would think this was an emergency situation. Therefore, we find that Deputy Harvey is entitled to qualified immunity.

*Bates v. Harvey*, 518 F.3d 1233, 1249 (11th Cir.2008).

The Eleventh Circuit's qualified immunity holding in this case falls squarely within this Court's controlling precedent. That precedent, in the Fourth Amendment context, consistently protects officers faced with difficult judgment calls in the absence of bright line rules. The qualified immunity standard is broad enough to cover "mistaken judgment" and is routinely afforded to "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 343, 106 S.Ct. 1092, 1097 (1986).

> The concern of the immunity inquiry is to acknowledge that reasonable mistakes can

> be made as to the legal constraints on particular police conduct. It is sometimes difficult for an officer to determine how the relevant legal doctrine . . . will apply to the factual situation the officer confronts. An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular [act] is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense.

*Saucier v. Katz*, 533 U.S. 194, 205, 121 S.Ct. 2151, 2158 (2001) (alteration supplied).

Under this Court's precedent, the Eleventh Circuit correctly found that Deputy Harvey was entitled to qualified immunity.

### B. *Steagald v. United States* Provides No Relevant Guidance On The Exigent Circumstances Question

Oddly enough, Petitioner relies almost exclusively upon *Steagald v. United States*, 451 U.S. 204, 101 S.Ct. 1642 (1981), for her argument that Deputy Harvey violated clearly established law. Critically, however, *Steagald* was *not* an exigent circumstances case. *Steagald*, 451 U.S. at 211, 101 S.Ct. at 1647 ("The question before us is a narrow one. The search at issue here took place in the absence of consent or exigent circumstances.").

By contrast, the exigent circumstances doctrine was the very basis upon which the Eleventh Circuit's qualified immunity decision rests in this case. Accordingly, Petitioner's reliance upon *Steagald* – a case that was *not* about exigent circumstances – reveals that Petitioner's qualified immunity argument is totally meritless.

*Steagald* involved officers with a piece of paper (an arrest warrant) trying to find someone in a third party's residence. However, that is where the similarities end. The *Steagald* holding told Deputy Harvey virtually nothing about whether the emergency circumstances he actually faced on March 21, 2003 presented exigent circumstances.

Exigent circumstances existed because Deputy Harvey had a court order (not an arrest warrant) issued *that morning*, stating on its face that a juvenile was an imminent danger to himself and others. He had information that the juvenile was in the residence. Therefore, the question Deputy Harvey faced was whether he could go in without a search warrant. If he had read *Steagald* that morning, Deputy Harvey would have found no guidance for the particular situation he confronted.

Even if Petitioner could identify some applicable exigent circumstances precedent, it still would be anomalous and unfair to deny Deputy Harvey qualified immunity in this situation. Substantially the same information – or less – has been held by numerous courts (including this Court and the Eleventh

Circuit) to support exigent circumstances. *See Brigham City, Utah v. Stuart,* 547 U.S. 398, 126 S.Ct. 1943, 1947 (2006) (observation of fight within residence, with one person spitting blood); *United States v. Arellano-Ochoa*, 461 F.3d 1142, 1145 (9th Cir.2006) (occupant's "quick dodge behind the door and closing of the blinds made it reasonable for the officers to conclude that there was a likelihood of danger to themselves, the woman, and the children" *outside the residence*, supporting exigent circumstances); *United States v. Najar*, 451 F.3d 710, 720 (10th Cir.2006) (911 hangups, with prolonged failure to answer the door to police, followed by false denial that 911 call had been made); *United States v. Martins*, 413 F.3d 139, 148 (1st Cir.2005) (where child was "exposed to toxic [marijuana] smoke" and denied presence of an adult, the situation "cried out for an immediate entry."); *Doe v. Kearney*, 329 F.3d 1286, 1298 & 1299 n.15 (11th Cir.2003) (exigent circumstances supported warrantless removal of suspect's children, based on suspect's criminal past, and allegations of child sexual abuse four or more years prior); *United States v. Holloway*, 290 F.3d 1331, 1337-1338 (11th Cir.2002) (anonymous 911 report of arguing and gunshots); *McCabe v. Life-Line Ambulance Service, Inc.*, 77 F.3d 540, 547 (1st Cir.1996) ("The potential consequences attending a delayed commitment – both to the mentally ill subject and others – may be extremely serious, sometimes including death or bodily injury."); *United States v. Hughes,* 993 F.2d 1313 (7th Cir.1993) (exigent circumstances based on report of woman and child in danger in crack house); *Russo v. City of*

*Cincinnati*, 953 F.2d 1036, 1044 (6th Cir.1992) (granting qualified immunity to officer who entered residence based on belief in suicide threat, and noting failure to find "a single case indicating that an officer's attempt to rescue what that officer believes to be a suicidal person does not constitute exigent circumstances."); *Lossman v. Pekerske*, 707 F.2d 288, 291 (7th Cir.1983) ("When a child's safety is threatened, that is justification enough for action first and hearing afterward."); *United States v. Mayes*, 670 F.2d 126, 128 (9th Cir.1982) (finding exigent circumstances to search for wad of tissue paper previously extracted from child's throat, even where child was in hospital under treatment at time of search).

In addition to over 20 years of precedent to support qualified immunity, it bears noting that the state court judge in Petitioner's criminal trial denied Petitioner's motion to suppress, which was premised on allegedly illegal entry of the residence. R2-36 Ex. 8 at 6. Thus, under the state of the law it would be unfair to expect Deputy Harvey to have come to a different conclusion, much less face personal liability for trying to serve a court order and protect life. "If judges . . . disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Wilson v. Layne*, 526 U.S. 603, 617-618, 119 S.Ct. 1692, 1701 (1999). That basic principle is the key to this case, and there is no reason to disturb the Eleventh Circuit's qualified immunity judgment.

## III. RESPONDENT WAS ENTITLED TO JUDGMENT BECAUSE THERE WAS NO FOURTH AMENDMENT VIOLATION

The first prong in the qualified immunity analysis is whether the Plaintiff can show a violation of a federal right. *Saucier v. Katz,* 533 U.S. 194, 201, 121 S.Ct. 2151 (2001). While Petitioner focuses on the second prong, *see* §§ I and II, *supra*, it bears noting that the Eleventh Circuit should have granted summary judgment to Respondent without addressing "clearly established law," because there was no Fourth Amendment violation. Four independent lines of authority converge to the same conclusion.

First, under this Court's precedent and Georgia law, Petitioner's probationer status diminished her Fourth Amendment rights and rendered her without a right against warrantless arrest in her residence. In *United States v. Knights*, 534 U.S. 112, 122 S.Ct. 587 (2001), and *Griffin v. Wisconsin*, 483 U.S. 868, 107 S.Ct. 3164 (1987), this Court recognized that probationers like Plaintiff have fewer Fourth Amendment rights than free citizens, and that the home of a probationer is subject to warrantless search. *Knights*, 534 U.S. at 120-121, 122 S.Ct. at 593 (finding a warrant requirement "unnecessary" as a predicate to search of a probationer's residence, and noting that probationers have a "significantly diminished . . . expectation of privacy."); *Griffin*, 483 U.S. at 876, 107 S.Ct. at 3170 (upholding regulation permitting warrantless search of probationer's home in light of

special needs of probation system, and fact that probationer is in state custody).

In *Jones v. State*, 282 Ga. 784, 653 S.E.2d 456 (2007), the Georgia Supreme Court found that O.C.G.A. § 42-8-38(a)[3] provides for warrantless arrest of a probationer like Plaintiff, even in her own home. *Id.*

> [O.C.G.A. § 42-8-38(a)] clearly attempts to severely limit probationers' rights against *arrest,* even at home without a warrant, based on less than probable cause. . . . The statute places probationers on notice that their rights have been limited and, in turn, diminishes their expectation of privacy.

*Jones*, 653 S.E.2d at 460 (emphasis in original).

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[3] O.C.G.A. § 42-8-38(a) provides:

> Whenever, within the period of probation, a probation supervisor believes that a probationer under his supervision has violated his probation in a material respect, he may arrest the probationer without warrant, wherever found. . . .

The text of O.C.G.A. § 42-8-38(a) relates to probation officers, but that is irrelevant to the statute's provision of notice to probationers and the Fourth Amendment analysis. Moreover, the Georgia Supreme Court holds that there is no material distinction between a probation officer, versus a peace officer like Defendant Harvey. *See Fox v. State,* 272 Ga. 163, 166, 527 S.E.2d 847, 850 (2000); *Battle v. State*, 254 Ga. 666, 671-672, 333 S.E.2d 599 (1985) (any peace officer can arrest for a probation violation).

Thus, *Jones* held "that the entry into [the probationer's] apartment for the purpose of arresting him was permissible, because the [officer] had . . . reasonable cause for the arrest." *Id.* at 460. Put succinctly, Petitioner had no Fourth Amendment right against a warrantless arrest in her home in March 2003 because she was a probationer. Because that "right" is the sole basis for Petitioner's false arrest claim, Petitioner cannot recover against Deputy Harvey.

Second, Petitioner was arrested only after appearing outside her residence and then effectively fleeing back inside. In *United States v. Santana*, 427 U.S. 38, 96 S.Ct. 2406 (1976), this Court held that police could effect a warrantless arrest of a woman inside her residence, after they first saw her at the threshold to the residence. *Id.* at 40, 96 S.Ct. at 2408. After finding probable cause and that the woman was in a public place at the threshold to her door, the Court held that "her act of retreating into her house" could not thwart "an otherwise proper arrest." *Santana*, 427 U.S. at 42, 96 S.Ct. at 2409.

*Santana* bars Petitioner's false arrest claim because Petitioner was in a public place outside the residence, saw a police officer approaching, and in response moved into her residence. Just like the officers in *Santana*, Deputy Harvey was approaching to arrest Petitioner. And, like the defendant in *Santana*, Petitioner could not thwart arrest merely by "retreating into her house." Under *Santana*, Deputy Harvey had sufficient authority to follow Petitioner into her residence to complete the arrest.

There was no Fourth Amendment violation for this arrest because *Santana* permitted Deputy Harvey to arrest Petitioner in her residence.

Third, exigent circumstances supported initial entry of the residence to look for T.W. As detailed in § II, *supra*, the Commitment Order and other information available to Deputy Harvey provided sufficient cause to believe that a life and death emergency existed sufficient to excuse lack of a search warrant. Furthermore, Respondent had reliable, probable cause to believe the minor in danger was located in Petitioner's residence based on statements from the mother and other information available at the residence.

Fourth, the special needs exception to the Fourth Amendment provided sufficient authority to serve the Commitment Order without a search warrant. Georgia's involuntary commitment statutes provide for a probable cause proxy (risk of danger to the patient),[4] under a judicial officer's supervision, and the scheme seeks to serve public health, rather than law enforcement purposes. *See* O.C.G.A. § 37-7-41(b);

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[4] In *United States v. Holloway*, 290 F.3d 1331, 1338 (11th Cir.2002), the court ruled that "in an emergency, the probable cause element may be satisfied where officers reasonably believe a person is in danger." Likewise, this Court has recognized that rationale under its exigent circumstances jurisprudence. *Brigham City, Utah v. Stuart*, 547 U.S. 398, 126 S.Ct. 1943, 1947 (2006) ("[L]aw enforcement officers may enter a home without a warrant . . . to protect an occupant from imminent injury."); *see Mincey v. Arizona*, 437 U.S. 385, 392, 98 S.Ct. 2408 (1978).

O.C.G.A. § 37-7-1(1), (8), (13) (casting definitions in terms of substance abuse and health risks). *Cf. McCabe v. Life-Line Ambulance Serv., Inc.*, 77 F.3d 540 (1st Cir.1996) (civil commitment order permitting forcible entry into private residences fell within the "special need" exception to Fourth Amendment warrant requirement).

Therefore, the present case presents a prototypical and appropriate scenario for application of the "special needs" doctrine and its associated Fourth Amendment balancing test. Under that balancing test, the State's compelling interests in protecting an endangered juvenile and his potential victims outweighed Petitioner's substantially diminished Fourth Amendment interests as a probationer.

For these reasons Deputy Harvey did not violate the Fourth Amendment when he attempted to execute the Commitment Order at Petitioner's residence and later arrested her, regardless of the Eleventh Circuit's rulings to the contrary. Lack of a Fourth Amendment violation undercuts Petitioner's argument for issuance of a writ of certiorari. Because Petitioner's Fourth Amendment rights were not violated, Petitioner's sole focus upon the "clearly established law" prong of the qualified immunity analysis is beside the point. *See Scott v. Harris*, ___U.S.___, 127 S.Ct. 1769, 1774 (2007) ("If, and only if, the court finds a violation of a constitutional right, 'the next, sequential step is to ask whether the right

was clearly established . . . in light of the specific context of the case.'" (citation omitted)).

## CONCLUSION

For the reasons discussed above, this Court should DENY Petitioner's request for issuance of a writ of certiorari.

Respectfully submitted,

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